Guild, Inc. *and* International Brotherhood of Electrical Workers, Local Union 520, a/w International Brotherhood of Electrical Workers. Cases 16–CA–15742–1 and 16–CA–15742–2

April 14, 1994

DECISION AND ORDER

BY MEMBERS STEPHENS, DEVANEY, AND COHEN

On September 3, 1993, Administrative Law Judge Richard J. Boyce issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Guild, Inc., Dallas, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In the last sentence of sec. IV,B,1 of his decision, the judge inadvertently refers to employee Neal rather than Foreman Wade.

Elizabeth Kilpatrick, Esq., for the General Counsel.
Stephen N. Wakefield, Esq., of Dallas, Texas, for the Respondent.

DECISION

STATEMENT OF THE CASE

RICHARD J. BOYCE, Administrative Law Judge. I heard this matter in Austin, Texas, on March 11, 1993.

The consolidated complaint arose from charges filed by International Brotherhood of Electrical Workers, Local Union 520, a/w International Brotherhood of Electrical Workers (the Union).[1]

The complaint alleges that Guild, Inc. (Respondent) violated Section 8(a)(3) and (1) of the National Labor Relations Act (the Act) on about September 2, 1992, by discharging employees Marcos Abrego and Ronald Neal. The complaint alleges that Respondent, by James Wade, an alleged supervisor, further violated Section 8(a)(1) in these respects:

(a) On about August 25, 1992, by interrogating a job applicant ''concerning his union membership activities and desires''; and,

(b) On about August 31, 1992, by threatening an employee that Respondent ''would not employ members of the Union on its jobsite'' and would ''close its operation . . . and reopen under a new company name with new employees'' if the existing employees ''joined or supported the Union''; and by interrogating an employee ''concerning their union membership activities and desires.''

I. JURISDICTION/LABOR ORGANIZATION

Respondent is an electrical contractor headquartered in Dallas, Texas. The complaint alleges, the answer admits, and I find that it is an employer engaged in and affecting commerce within Section 2(2), (6), and (7) of the Act.

The pleadings also establish and I find that the Union is a labor organization within Section 2(5) of the Act.

II. OVERVIEW

Respondent is the electrical subcontractor in the renovation of the William P. Clements State Office Building in Austin. Work began in August 1992, and is projected to last from 18 months to 2 years. By August 31, Respondent's crew had grown to seven electricians and helpers, including the two whose discharges are in issue, Abrego and Neal. Abrego began on August 25; Neal, on August 26. Both were discharged September 2. Both are long-term union members. Respondent is nonunion.

Respondent's ranking person regularly onsite is James Wade. The complaint alleges and the answer denies that he is a statutory supervisor. Wade's immediate superior is James Elliott, corporate vice president. Elliott depicted himself as ''operations manager and in charge of all field operations and, basically, the whole company.''

The general contractor on the project is Dal-Mac Construction Company. Its ranking person regularly onsite is Craig Moyer, project superintendent. Moyer reports to James Evans, Dal-Mac's systemwide project manager.

III. THE ALLEGED VERBAL MISCONDUCT

A. *The Status of James Wade*

1. Evidence

Respondent hired Wade in April 1992. In August, it transferred him to Austin from a project nearing completion in Ardmore, Oklahoma. All others comprising Respondent's Austin crew were new hires.

A document entitled ''Employee's Individual Earnings Record,'' apparently prepared coincident with Wade's hire, lists his ''occupation'' as ''Elec. Supt.'' That notwithstanding, Elliott termed him Respondent's ''lead journeyman'' on the Ardmore and Austin projects.

> Elliott elaborated that Wade is . . .
>
> a working foreman, working journeyman, and he does layout, organizes the men, and asks other journeymen to go do other functions of a journeyman electrician.
>
> Elliott described layout as taking . . .

[1] The charges were filed on September 3 and 4, 1992. The complaint issued on October 14.

> an engineered set of drawings, and then you come up with a list of material or a layout that other journeymen can follow, that would make all the floors similar, that would improve production. . . .

Elliott added that any experienced journeyman can do layout.

Wade likewise called himself the lead journeyman on the Austin job. He testified that a ''majority'' of his time is devoted the ''installation of electrical conduits and wiring, panels, stuff like that''—''that and laying out.''[2] Echoing Elliott, Wade averred that journeyman electricians ''commonly'' do layout. He described layout thus:

> I will draw out the conduit routing and stuff on the drawings, and then take a couple of guys, and we will go over there, and I will show them how we want to run it and stuff like that, tell them what circuits to drop off where.

Both Abrego and Neal referred to Phillip Sims, inarguably below Wade, as their foreman. Abrego expanded:

> [W]e always took our orders from Phillip. He . . . told us what needed to be done, laid us out as far as what James [Wade] wanted us to do next.[3]

Neal likewise testified that Sims ''was giving the orders on the job''; that Wade ''very seldom'' communicated directly with him or the other crew members.[4]

Sims did not testify.

Dal-Mac's Evans testified that, while both he and his project superintendent, Moyer, have ''some interface with'' Elliott, Moyer deals with Wade ''on a day-to-day basis.'' To like effect, Wade testified that Moyer ''would normally come to'' him if he had complaints about Respondent's employees. Evans added: ''My understanding he [Wade] is a foreman and he is in charge of on-site production.''

Moyer did not testify.

Wade undeniably participated in the hire of the Austin crew. Respondent would have it, even so, that he neither possessed nor exercised meaningful authority in that regard. Wade testified that the hiring procedure consisted of the applicants' ''fill[ing] out the necessary paperwork, and . . . Elliott would go over it and decide whether or not to hire them.'' When Elliott was not in Austin, Wade testified, ''he would tell me that they are hired and ask me to convey the message to them.''

Wade further testified, with specific reference to the hire of Abrego:

> [Abrego] filled out the paperwork, and I helped him with some of it. He had a few questions on some of the different lines he was supposed to fill out, and I helped him with it, and then I believe he talked to James Elliott, and James hired him.

Abrego disagreed, testifying that Wade interviewed him on August 24, instructing him to begin work the next day; that Wade ''did the hiring.'' Abrego generalized, consistent with Evans, that Wade was Respondent's ''main man in charge'' on the project.

Elliott, too, contradicted Wade. He testified that Wade ''put Abrego and Sims to work'' without Elliott's first seeing them. Elliott contended, however, that he later interviewed them and ratified their hire. Elliott's testimony:

> I had some business to take care of about getting licenses in order, . . . and I had left and told Mr. Wade to . . . put anybody to work that was willing to work, and that I would talk to them when I got back. . . . I didn't tell [Wade] to hire them. . . . I told Mr. Wade to allow anybody that wanted to work to come to work, and I would talk to them.

Elliott continued:

> I interviewed them [Abrego and Sims] that day, I believe. . . . I asked about their experience and just looked at their application, and told them that there was a mistake in what they thought they were going to make.

The ''mistake'' to which Elliott referred was Wade's telling Abrego and presumably all journeymen their hourly pay would be $11. This being a ''prevailing-wage'' project, $16.20 was the mandated minimum journeyman rate. Elliott testified earlier that he ''took Mr. Sims and Mr. Abrego over to the side and told them that their rate . . . would be more.'' Elliott to the contrary, Abrego testified that Wade gave him the ''good news.''

Wade testified that Respondent hired Neal ''in the same manner as Mr. Abrego''; that this was ''pretty much the same pattern and practice'' used to hire all the crew. Wade particularized concerning Neal:

> [H]e asked me what the pay rate was, and I told him, and he wanted more, and I think me and James [Elliott] had a conversation about it. I told him that Neal wanted some more money, and James said that was okay, and I said, ''I will go ahead and pay him that.''

Wade testified, the word suggested by Respondent's counsel, that Elliott ''okayed'' Neal's hire.

Neal recounted that Wade interviewed him, and that he was hired ''within ten minutes'' after he filled out his application. Neal enlarged:

> I filled out the application, and then I gave [Wade] the application, and he reviewed it, and he came back and said, ''You can report to work tomorrow at 7:00 o'clock,'' which would have been the 26th. . . . He went to talk to someone else. I don't know who he talked to. . . . [H]e went in the office and shut the door, and he came back out and he said, ''You can report to work tomorrow at 7:00 o'clock.''

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[2] Similarly, Abrego testified that Wade ''was out there working . . . as a member of the crew.''

[3] Abrego added that Sims worked with the tools ''very rarely''; that ''he mostly walked around with a blueprint in his hand, just telling us what to do and stuff.''

[4] The complaint, as amended during the hearing, alleges that Sims was an agent of Respondent as defined by Sec. 2(13) of the Act. The General Counsel attributes no misconduct to him, and I see no need to make a finding one way or the other.

Neal continued that, when he refused Wade's initial wage offer of $8, Wade ''went off and talked to someone else,'' then returned to say, ''We can probably give you $10 an hour.''

Elliott assertedly interviewed Neal, but offered no substantiating details.[5] Neal insisted that he ''didn't interview with Mr. Elliott''—''I asked him about parking situations after the interview, but I did not have any interview with him, per se, one on one.''

Although Wade signs and dispenses termination notices on the Austin project, Respondent maintains that he has no voice in the underlying decisions. Wade testified regarding the terminations of Abrego and Neal that Elliott ''told [him] who he had selected'' without first inviting his opinion, and that he does not know why Elliott chose them.

In addition, Wade denied having authority to assign overtime (''I have to go through James Elliott on that''), impose discipline, evaluate employees, or recommend raises. Wade admitted that he can grant employees permission to leave the job, but only if Elliott is not available.

On September 21, Dal-Mac issued a ''Subcontractor Field Change Authorization'' authorizing Respondent to ''work entire crew on overtime to get power to lights on 9–10–11 floors.'' Wade signed for Respondent beneath a clause stating:

> We hereby agree to furnish labor and materials—complete in accordance with the above specifications and accept this field change authorization as a modification to our original agreement and will be performed subject to all the same terms and conditions as contained in the original agreement.

Again led by Respondent's counsel, Wade testified that he first discussed ''this matter'' with Elliott; that Elliott ''authorized [him] to execute it on his behalf.''

Wade represents Respondent at biweekly subcontractors' meetings also attended by representatives of Dal-Mac and other subcontractors. Dal-Mac's Evans testified that these meetings are to ''review [the] status of production on the project.''[6]

Wade testified that Elliott visits the Austin project from Dallas ''once, twice, a week at least,'' and is there ''all day.'' In contrast, Elliott testified that he visits that project ''every two weeks . . . when they are actively working,'' and ''about once a month'' otherwise. Austin is about 190 miles from Dallas.[7]

Wade also testified that he speaks with Elliott by telephone ''three times a day,'' on average, when Elliott is not onsite. Asked who initiates these calls, Wade testified: ''Sometimes he would call or page me; sometimes I would call him. I would say 50–50.'' Wade testified that some of the calls are routine, and some are prompted by incidents on the job.

Respondent pays Wade's room and board in Austin.[8] He is hourly paid and receives an overtime premium. The record leaves to conjecture his wage on the Austin project.[9]

2. Discussion

Section 2(11) of the Act states:

> The term ''supervisor'' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Possession of any one of the stated indicia confers supervisory status. *Phelps Community Medical Center*, 295 NLRB 486, 489 (1989). The General Counsel, as the party contending that Wade is a supervisor, bears the burden of proof. *Printing Pressmen's Local 55 (Birmingham News)*, 300 NLRB 1 (1990). ''[W]henever the evidence is in conflict or otherwise inconclusive on particular indicia,'' the Board ''will find that supervisory status has not been established . . . on the basis of those indicia.'' *Phelps Community Medical Center*, supra at 295 NLRB 490. And, the Board

> has a duty to employees to be alert not to construe supervisory status too broadly because the employee who is deemed a supervisor is denied employee rights which the Act is intended to protect.

Id. at 492.[10]

I conclude that the General Counsel has satisfied her burden. My reasons are these:

(a) Elliott admitted that Wade ''put Abrego and Sims to work'' without Elliott's seeing them. Elliott's testimony that he told Wade ''to allow anybody that wanted to work to come to work,'' the implication being that Wade exercised no independent judgment in the matter, strains credulity beyond the breaking point.

(b) Crediting Neal, only Wade interviewed him.[11]

(c) Beyond participating in the hiring process, Wade signs and dispenses termination slips. His testimony that he is only a conduit in these respects was not convincing.

(d) In addition to the evidence showing that Wade satisfies some of the statutory elements denoting supervisory status, the record contains abundant ''secondary criteria'' consistent with his being a supervisor. Among them: (1) Of those comprising Respondent's Austin crew, it transferred only Wade from another project; (2) Respondent pays Wade's room and

[5] Elliott testified, simply: ''I interviewed Mr. Neal.''

[6] Asked by Respondent's counsel if it was ''unusual'' for leadmen—i.e., nonsupervisors—to attend one of these meetings, Evans replied: ''No. That is usually standard.'' Although called by the General Counsel, Evans struck me as receptive to suggestion during cross-examination by Respondent's counsel.

[7] Elliott also testified that he visits a supercollider project in Waxahachie, Texas, ''about every two weeks''; that he visited the Ardmore site ''once a week, probably,'' at relevant times; and that he spends ''three, four days a week'' in Dallas.

[8] Wade normally resides in Dallas.

[9] Wade's Individual Earnings Record discloses that his hourly wage, when hired in April, was $17.

[10] Quoting from *Westinghouse Electric v. NLRB*, 424 F.2d 1151, 1158 (7th Cir. 1970).

[11] Neal's testimony in this regard was persuasive, and Wade admittedly discussed pay with Neal. Elliott's testimony that he interviewed Neal was devoid of substantiating detail and unconvincing.

board in Austin—a considerable benefit doubtless not given crewmembers generally; (3) crediting Elliott, Elliott visits the Austin jobsite at most ''every two weeks,'' meaning the crew would be without onsite supervision for prohibitively extended periods were Wade not a supervisor; (4) Wade represents Respondent in ''day-to-day'' dealings with Dal-Mac's Moyer; (5) Wade signs change authorizations binding on Respondent; and (6) Wade attends the biweekly subcontractors' meetings on Respondent's behalf.[12]

(e) The testimony of Elliott and Wade concerning Wade's authority struck me as contrived and poorly rehearsed understatement. Among the telltale signs: (1) Both testified that Wade was a lead journeyman throughout his tenure, whereas his Individual Earnings Record indicates that Respondent classified him as an electrical superintendent when hired; (2) as against Wade's testimony that Abrego ''talked to James Elliott, and James hired him,'' Elliott testified that Wade ''put Abrego . . . to work'' without Elliott's seeing him; (3) while Wade would have it that Elliott visits Austin ''once, twice, a week at least,'' Elliott testified that he visits ''every two weeks . . . when they are actively working''; and (4) Elliott testified at one point that he told Abrego and Sims about the ''mistake'' in their pay while interviewing them, and at another that he ''took [them] over to the side and told them.''[13]

B. *The Alleged Interrogation*

1. Evidence

Neal testified that, while being interviewed by Wade on August 25, Wade asked him if he was ''affiliated with a union''; and that, rather than risk rejection, he said he was not. Neal denied—''No, I did not''—asking this question.

2. Discussion

Neal impressed me, by both his demeanor and the content of his testimony, as a genuine and capable witness. Wade, on the other hand, seemed more concerned with outcome than with honoring the oath. I therefore credit Neal that Wade interrogated him as described.

So doing, I conclude that Wade violated Section 8(a)(1) as alleged. Quoting from *Gilberton Coal Co*., 291 NLRB 344, 348 (1988):

> [Q]uestions concerning union preference, in the context of job application interviews, are inherently coercive and unlawful, even when the applicant is hired.[14]

C. *The Alleged Threat and Interrogation*

1. Evidence

Ralph Merriweather, a business agent for the Union, met with Respondent's employees at the jobsite on Friday, August 28, touting representation.

The morning of Monday, August 31, Abrego testified Wade remarked to him that he ''understood'' the employees had had ''a visitor on Friday.'' Abrego was working on the ninth floor at the time, as he recalled, and Wade then asked him to ''go downstairs with him to unload some material'' from a truck. During their ensuing elevator ride, Abrego testified, Wade said Respondent ''had hired union help on a previous job that they had done here in Austin last year, and they weren't worth a fuck.''

Abrego's recital went on:

> I showed him my pin and I told him I was a union member, myself, and he just turned around and said, ''No shit.'' Then . . . he proceeded to say, ''Well, if the Union tries to come over here and organize this job, we will just shut it down and then come back under a new company name and hire all new people.

Abrego testified that he said nothing more on the subject, and they ''proceeded to unload the material.''

Wade denied saying Respondent ''would close down and come back under another name'' if it experienced ''any kind of union problems.'' He also denied saying unions ''weren't worth a fuck.'' Wade did not otherwise address this incident.

2. Discussion

Abrego told his story with manifest sincerity and in convincing detail. Wade's denials, lawyer-led and mechanical, suffered in comparison; and, as I have indicated, his credibility generally did not impress me. I consequently credit Abrego's rendition.

I again conclude that Wade violated Section 8(a)(1) as alleged. His saying Respondent would ''just shut it down and then come back under a new company name and hire all new people'' should the Union try to organize was a classic violation. And his prefatory remark—that he ''understood'' the employees had had ''a visitor on Friday''—doubtless was intended to draw Abrego out (as indeed it did) concerning his union sympathies, thus was interrogative in purport if not in form, and constituted an additional violation given the blatant coerciveness of his ensuing comments. *Wykle Research*, 290 NLRB 1062, 1069 (1988).[15]

IV. THE DISCHARGES

A. *Evidence*

As noted, Abrego began on August 25 and Neal on August 26. Respondent hired Abrego as a journeyman electrician, and Neal as a helper.[16] Respondent worked them as a team for the most part.

Abrego informed the Union before reporting that he had gotten the job, and that his hourly pay would be $11. Business Agent Merriweather told him it was a ''prevailing-wage job,'' that he should be getting $16.20 an hour, and that the Union would ''make a call . . . to get that wage enforced.''

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[12] I reject as self-serving and improbable Respondent's contention that Wade serves as a mere cipher in the several respects in which he represents it on the project.

[13] Elliott to the contrary, I credit Abrego that Wade in fact gave him the ''good news.''

[14] See also *Willmar Electric Service*, 303 NLRB 245, 251–252 (1991); *Lassen Community Hospital*, 278 NLRB 370, 374 (1986).

[15] See also *Churchill's Supermarkets*, 285 NLRB 138, 139 (1987); *Structural Finishing*, 284 NLRB 981, 982 (1987); *Establishment Industries*, 284 NLRB 121, 123–124 (1987).

[16] Neal testified, however, that he ''was basically doing journeyman electrician's work''—''I was installing the fixtures and also coming back behind and wiring the fixture up to the system.'' He testified that he is a licensed journeyman.

The record does not disclose if such a call in fact transpired. Abrego credibly testified that, when he reported for work on August 25, Wade told him he had ''good news and bad news''—that he would receive $16.20, but that he would be ''on a five-day probation period.'' Wade added, as Abrego convincingly recalled, that Abrego probably had ''nothing to worry about since [Respondent] was having trouble finding people to man the job''; and that the project would entail ''about two years' of work.''

As previously mentioned, the Union's business agent, Merriweather, spoke to the employees at the jobsite on Friday, August 28. One of the crew, Phillip Sims, tape-recorded the meeting. Abrego and Neal credibly testified that Sims said that he did this so Wade and Elliott, who were not onsite that day, could listen.

Elliott testified that he learned about the organizational ferment ''the day . . . Mr. Merriweather came on the job.'' He explained:

> Craig Moyer from Dal-Mac . . . called me and told me that my men were gathering in the break room for a meeting. . . . Probably after the meeting, or maybe during the meeting.

Elliott later testified:

> After the meeting was over, Craig Moyer called me and told me that there was a meeting. . . . He was just wanting me to know that my men . . . were actively not working. They were taking an extended break and having a meeting with a union organizer, and that his concerns were safety on the job for people not—people shouldn't be on the job should check in to Dal-Mac's office first, and always observe safety rules.

Moyer also said, according to Elliott, that he had a tape recording of the meeting. Elliott testified that Moyer imparted ''the impression that he gave the recorder to Mr. Sims, and Mr. Sims recorded it for him''; and that Moyer ''just wanted to let [Elliott] know that he had a tape, that [Elliott] should listen to it.''

Wade testified that did not learn about the organizing activity or the tape until Monday, August 31, when Moyer ''told [him] that an organizer had been out on the job, and he taped it.'' Wade denied—''not at all''—that he and Sims discussed Merriweather's visit.

As noted, neither Moyer nor Sims testified.

August 31 saw several noteworthy developments:

(a) Merriweather, on behalf of the Union, petitioned the NLRB for an election among the electricians employed by Respondent within the Union's jurisdiction.[17]

(b) Abrego wore a union pin and Neal a union hat to work that day. Neither had done this before, and the record contains no evidence that other crewmembers followed suit.

(c) As earlier described, Wade induced Abrego to declare his union membership, then announced, unlawfully, that Respondent would ''just shut it down and then come back under a new company name and hire all new people'' should the Union ''organize this job.''[18]

(d) An inspector for the State, Delwood (Buddy) Kruse, visited the site.[19] Although the job specifications authorized Respondent to use MC cable, that was a departure from past practice and Kruse told Respondent and Dal-Mac that he did not think MC cable was ''what the State had in mind.'' The project manager for the State, John Patterson, in turn asked Dal-Mac that same day to submit a proposed change order specifying flexible metal conduit. Respondent accordingly stopped using the MC cable on September 1.[20]

The morning of the next day, September 1, Wade directed Abrego to redo some work. Abrego's account:

> He . . . told me that some rings that I had cut in a sheetrock wall were off, that the sheetrockers were complaining that they were all crooked. So he instructed me to go back and fix them. So I went back and I started measuring them, and I was measuring them all the way down, and this was like 40 MP rings that I cut in; and after about halfway checking through them I found out that the most they were off were a sixteenth of an inch.
>
> And those MP rings have a little bit of play in them when you cut them inside the sheetrock wall, to where they are adjustable . . . about half an inch. And I just went ahead and fixed them up, and I checked all the rest of them, and I went back and told them that they were okay, and [Wade] just made the statement that the sheetrockers had complained that they were crooked.

Wade testified that Moyer had complained to him ''about some sloppy work, cutting in some boxes and stuff, that the plates wouldn't cover.'' Wade testified that he could not recall discussing this with Elliott. Elliott recalled, on the other hand, that Wade told him about it—that Abrego ''was cutting items in sheetrock, and they were not straight and

[17] Case 16–RC–9534. I take official notice of the petition, which is not in evidence.

[18] Later on August 31, Abrego credibly testified, Sims ''was congratulating'' him—presumably sarcastically—''for being in the Union.'' Abrego countered that ''the Union had got us that prevailing wage on the job''—that it ''didn't just do it for'' Abrego, it ''did it for all of us''; and Sims shot back that the Union ''ain't never done shit for'' him and ''walked off.''

[19] Kruse testified that he made this visit in the ''last part of August''—''around'' August 30 or 31. August 30 being a Sunday, I find that it occurred on August 31.

[20] Identical letters dated September 8 and 11, from Dal-Mac's Evans to Respondent's Elliott, are in evidence. They state in part: ''As of 11:30 A.M. on 9–1–92, all use of M.C. cable in walls is on hold. This area is on hold for revised pricing, using flexible conduit. We will inform you of final decision as soon as possible.'' Elliott ventured this reason for the second letter: ''I may have called him [Evans] and asked him to send it again, because I didn't know if I had the letter back to my office yet. It didn't get to me, and so he probably typed another one up and sent it to me.''

Evans explained the letters' belatedness this way:

> After . . . approximately two weeks . . . I sent a letter to them, putting them on formal hold at that time, because after a period of two weeks I felt like it was necessary to document to them and to the State . . . the length of duration that they had us on hold, because . . . we still had expenditures of overheard that we wanted to make sure the state understood could start impacting the general conditions to the job.

level.''[21] Wade termed the matter ''really minor''; Elliott, ''a minor problem.''

I note again that Moyer did not testify.

On September 2, Wade gave termination notices to Abrego and Neal as they were working together on the ninth floor. Both cited ''lack of work'' and stated: ''Job is not progressing as planned.''

Wade told them he was ''sorry,'' as he recalled, but that Respondent ''just can't keep everybody busy.'' Abrego testified that Wade also said he ''might be calling [them] back . . . if work picked up.'' Neal recalled Wade's saying the terminations were ''not for lack of production,'' but that Respondent had ''run short of work on this particular floor.'' Neal testified that he reminded Wade of a previous assurance that ''there was 18 months worth of work here in this building''; and that Wade responded, alluding to the matter of the MC cable: ''There is, but, you know, there has been a hold on it.''

Dal-Mac submitted its proposed change order on September 4. The State later decided, however, that this was unnecessary; that MC cable was acceptable, after all. This decision was communicated to Dal-Mac on about September 10.[22] Elliott testified that Respondent resumed full operation ''around the week of the 17th, 18th, of September.''[23]

Elliott testified that he decided to reduce crew size because of the hold concerning the MC cable. He enlarged:

> When we were told to stop wiring with MC cable, the work was not there for the full crew, and we didn't know how long it would take to get the problem resolved, and we elected to cut the crew back to be more productive. . . . [W]hen we were put on hold, it was . . . to the business's advantage not to have an overload of people on the job.

Elliott perhaps was using ''we'' in the royal or editorial sense. He testified that he alone selected Abrego and Neal, and that he ''sent the termination notice[s] to Austin.'' Wade, as earlier mentioned, testified that Elliott ''told [him] who he had selected'' without first inviting his opinion, and that he not know why Elliott chose Abrego and Neal. Wade, however, did sign the termination notices.

Elliott initially advanced these grounds for choosing Abrego and Neal:

> I went to the payroll sheets and pulled out the last apprentice hired and the last journeyman hired, and also I had been contacted . . . that Dal-Mac had complained about some wiring methods or some installation methods of Mr. Abrego. And I elected at that time, since they were working as a pair, to let both of them go.

In fact, Abrego was not the last journeyman hired. Respondent hired him and Sims at the same time.

Elliott later testified that Abrego's and Neal's working as a team was not factor, and that Dal-Mac's complaints about Abrego were not ''a real significant factor.'' He also testified that he assigned no weight to Neal's hourly wage ($10, as against $8.69 for helpers generally and $6.98 for laborers), only to append:

> [I]t may have influenced it some, based just upon economics of the job and not knowing how long we would be in this situation. . . . I think money influences all of my business decisions.

Elliott continued that no ''single, overriding factor'' predominated; that it was ''just a weighted decision.''

Asked yet again what considerations affected the decision, Elliott testified:

> Mr. Abrego, it was mainly I had already experienced . . . some problems with him; and, on Mr. Neal, it was specifically he was the last experienced helper hired at that rate.

By ''problems,'' Elliott presumably meant Moyer's supposed complaint about Abrego, mentioned earlier. Elliott testified this time (to a leading question from Respondent's counsel) that it was ''one of the factors that may have entered'' his mind in choosing Abrego.

Elliott professedly had no idea that Abrego and Neal were engaged in union activity. He testified that he ''never played'' the tape of the August 28 Merriweather meeting despite Moyer's urging; indeed, that he did not receive it from Moyer until the week before the trial. Elliott also testified that he did not know if Moyer gave the tape to Wade, but that he is ''sure'' Moyer listened to it.

Elliott testified that Abrego and Neal had not been installing MC cable; rather that they ''were cutting in holes, getting ready to'' install the cable. He then amended: ''I believe they had been doing some'' cable installation. Abrego testified that he had been ''laying in light fixtures, screwing up boxes.''

Elliott estimated that ''over 50 percent'' of Respondent's work was ''on hold'' pending resolution of the cable problem. Wade granted that the hold did not mean ''absolutely no work''; that ''there were a few things that we could work on.'' Abrego testified that, despite the hold, ''there was still more work to be done in all the other floors that had not even been touched.'' Neal testified that he ''knew something was wrong, because we got moved to other floors to put in light fixtures.'' Neal added:

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[21] Elliott testified twice, both before and after Wade. That Wade told him about the Abrego complaints occurred pre-Wade. Asked post-Wade how the complaints had come to him, he testified: ''I believe it came from Craig Moyer . . . and then I probably . . . asked him to get with Wade and have it checked out.'' He later averred that he is not ''absolutely clear'' who told him.

[22] Minutes of a September 10 meeting involving the State's Patterson and Dal-Mac's Evans and Moyer, among others, include this passage: ''Electrical wiring situation has been resolved and will no longer impact schedule.''

[23] Explaining the delay from September 10, Elliott testified: ''We were down for some additional time due to not having the proper materials on the job or enough material on the job. We had stopped purchasing material until we had this problem resolved.'' Wade and Dal-Mac's Evans testified to like effect.

Elliott elsewhere testified, according to the transcript, that the job was on partial hold until ''around the 16th to the 18th of November.'' The weight of evidence leaves no doubt that he either misspoke or the transcript is in error; that he meant to say September.

> [W]e were laying fixtures when Mr. Wade came up and said we were laid off, and we were only about a third of the way through that one floor, so there was work there to do.

Respondent's timesheets disclose that the discharges of Abrego and Neal and the early September departure of Ron Colwell, a part-time laborer, reduced the complement to 4;[24] that it returned to 7 with the hire of 3 on September 29; and that it ranged from 6 to 10 during the remainder of the year.

On September 21, as previously noted, Dal-Mac authorized Respondent to ''work entire crew on overtime.'' Evans explained that this was to enable Respondent to catch up with the subcontractors, ''not put on hold'' because of the cable problem. The timesheets reveal that Respondent's crew logged an aggregate 120.5 hours of overtime from September 30 through October 6, 23.5 from October 14 through 20, 63 from October 21 through 27, 166.5 from October 28 through November 3, 65 from November 18 through 24, 32.5 from December 2 through 8, and lesser amounts during other weekly periods.

By letter dated October 9, Elliott offered recall to Neal. The letter stated in relevant part:

> Guild, Inc. has resolved it's [sic] difference with the State in relation to the wiring methods.
>
> At this time we are able to offer you your job back at the same rate of pay.
>
> You should understand that this project will be complete within the next seven to ten months and at this time Guild, Inc. has no other work in the Austin area.
>
> Please respond to our offer in writing by October 16, 1992.

Neal did not reply. Abrego did not receive a similar offer.

B. *Discussion*

In *Wright Line*, 251 NLRB 1083, 1089 (1980), the Board stated:

> [W]e shall henceforth employ the following causation test in all cases alleging violation of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, we shall require that the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a ''motivating factor'' in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.[25]

I conclude, based on the following confluence of factors, that the General Counsel has made the requisite prima facie showing:

(a) Abrego and Neal made their union sympathies public on August 31—two days before the discharges—by displaying union insignia at work. The record suggests that none of the other crew members did likewise.

(b) Abrego also revealed his sympathies by disclosing his membership to Wade on August 31.

(c) Given that Abrego and Neal first openly displayed their sympathies the same day the Union filed for an NLRB election, and the first workday after the Union's business agent, Merriweather, visited the job to promote representation, management likely inferred that they instigated those developments.

(d) As shown by Wade's unlawful threat to Abrego on August 31—that Respondent would ''just shut it down and then come back under a new company name and hire all new people'' should the Union try to organize—Respondent harbors a pronounced aversion to collective bargaining.

I conclude, as well, that Respondent has not overcome the General Counsel's prima facie showing. My reasons are these:

(a) While the hold on MC cable seemingly was legitimate, Elliott's testimony was not persuasive that it dictated a reduction in force. Abrego and Neal both convincingly testified that abundant work remained,[26] which indicates that Respondent seized on the hold as a convenient pretext.

(b) Despite being cleared to resume normal operation on about September 10, receiving Dal-Mac's overtime authorization on August 21, hiring three new employees on August 29, and assigning considerable overtime starting in late September, Respondent never invited Abrego back and waited until October 9 (5 days before the complaint issued) to invite Neal. This, too, bespeaks a reason other than the hold for discharging them.

(c) Elliott's stated reasons for choosing Abrego and Neal were self-impeachingly vague,[27] shifting, conflicting,[28] and demonstrably untrue in at least one instance.[29]

(d) Little if any of the work done by Abrego and Neal had involved cable installation.

(e) Apart from the chinks in Elliott's credibility elsewhere noted, his professed ignorance of Abrego's and Neal's union proponency was so fundamentally implausible that it undercut his veracity generally. Not only had he learned on August 28 about Merriweather's visit, but Abrego and Neal displayed union insignia starting August 31, Abrego told Wade on August 31 of his membership (provoking Wade's unlaw-

[24] An entry in Colwell's Individual Earnings Record states that he quit. Wade testified, however, that he was laid off. Wade elaborated: ''[Colwell] had told me that he was going to be taking another job in a couple of weeks, and he had to go to school or something, and wanted to work like one or two days a week. And James [Elliott] decided just to go ahead and lay him off at that point, because we didn't have enough work to keep the guys going, anyway.'' Colwell's Individual Earnings Record also states that he left September 2, whereas the timesheets credited him with 8 hours on both September 8 and 9.

[25] This formulation received Supreme Court approval in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

[26] I am persuaded that Elliott and Wade (consistent with their penchant generally for strategic overstatement or understatement) seriously exaggerated the extent that the hold forced a curtailment of activity.

[27] For instance, Elliott's testimony that no ''single, overriding factor'' predominated; that it was ''just a weighted decision.''

[28] For example, Elliott first testified that he selected Abrego and Neal ''since they were working as a pair''; then, that this was not a factor. And he testified that Dal-Mac's complaints about Abrego were not ''a real significant factor''; later, that he chose Abrego ''mainly'' because he ''had already experienced . . . some problems with him''; and, yet later, that the complaints ''may have entered'' his mind.

[29] Elliott's assertion that Abrego was the last journeyman hired, when he and Sims were hired at the same time.

ful outburst), and Wade supposedly speaks with Elliott by telephone about ''three times a day.''

(f) Wade's credibility suffered from implausibility, as well. Notable instances were his assertion that he and Sims did not discuss—''not at all''—Merriweather's August 28 visit; his testimony, in the context of the two discharges, that Elliott ''told [him] who he had selected'' without first inviting his opinion; and his further testimony that he did not know why Elliott chose Abrego and Neal.

Respondent thus violated Section 8(a)(3) and (1) as alleged by discharging Abrego and Neal.

CONCLUSIONS OF LAW

Respondent violated Section 8(a)(3) and (1) on September 2, 1992, by discharging Marcos Abrego and Ronald Neal.

Respondent further violated Section 8(a)(1) on August 25, 1992, when James Wade interrogated Neal about his union affiliation during a job interview; and on August 31, 1992, when Wade implicitly interrogated Abrego about his union sympathies, and told him:

> Well, if the Union tries to come over here and organize this job, we will just shut it down and then come back under a new company name and hire all new people.

REMEDY

I will provide in my recommended Order that Respondent cease and desist from the unfair labor practices I have found, and that it take certain affirmative action to effectuate the policies of the Act.

With regard to the latter, I will direct that Respondent offer Abrego and Neal reinstatement to their former or substantially equivalent positions, if it has not already done so,[30] without prejudice to their seniority and other rights or privileges; that it make them whole with interest where appropriate for their loss of earnings and benefits because of its unlawful discharges of them;[31] and that it remove from its files and destroy any and all writings comprising, documenting, or referring to the discharges, and notify Abrego and Neal in writing that this has been done and that those unlawful actions will in no way serve as a ground for or influence future personnel or disciplinary action against them.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[32]

ORDER

The Respondent, Guild, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees for belonging to or engaging in activities in support of International Brotherhood of Electrical Workers, Local Union 520, a/w International Brotherhood of Electrical Workers, or any other labor organization.

(b) Coercively interrogating job applicants or other employees about their union affiliation, activities, or sympathies.

(c) Threatening employees that Respondent will shut down, hire all new employees, and come back under a new name if a union should try to organize its employees.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) If it has not already done so, offer Marcos Abrego and Ronald Neal immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights or privileges, and make them whole as prescribed above in the remedy section of this decision for any loss of earnings and benefits they suffered because of Respondent's unlawful discharges of them.

(b) Remove from its files and destroy any and all writings comprising, documenting, or referring to the discharges, and notify Abrego and Neal in writing that this has been done and that those unlawful actions will in no way serve as a ground for or influence future personnel or disciplinary action against them.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts owing under the terms of this Order.

(d) Post at at its jobsite in Austin, Texas, at the William P. Clements State Office Building, copies of the attached notice marked ''Appendix.''[33] Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[30] While the recall offer embodied in Respondent's October 9 letter seemingly satisfied its obligation to Neal in this respect, I yield to the compliance stage for a final determination.

[31] Abrego's and Neal's make-whole entitlements shall be computed as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950). Interest shall be figured as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[32] I deny any outstanding motions inconsistent with this Order. If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[33] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against employees for belonging to or engaging in activities in support of International Brotherhood of Electrical Workers, Local Union 520, a/w International Brotherhood of Electrical Workers, or any other labor organization.

WE WILL NOT coercively interrogate job applicants or other employees about their union affiliation, activities, or sympathies.

WE WILL NOT threaten employees that we will shut down, hire all new employees, and come back under a new name if a union should try to organize our employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, to the extent we have not already done so, offer to Marcos Abrego and Ronald Neal immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights or privileges, and WE WILL make them whole for their loss of earnings and benefits because of our unlawful discharges of them.

WE WILL remove from our files and destroy any and all writings comprising, documenting, or referring to the discharges, and WE WILL notify Abrego and Neal in writing that this has been done and that those unlawful actions will in no way serve as a ground for or influence future personnel or disciplinary action against them.

GUILD, INC.